No. 12401

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

FOSTER TRANSFER COMPANY,
a corporation,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

JURISDICTION

The jurisdiction of the United States District Court is set out in Paragraph I of the appellee's complaint which reads as follows:

> "This action arises under the Act of Congress of March 3, 1887, C. 359, 24 Stat. 505; U.S.C.

> Title 28, Section 41(20). That the action is one upon an express contract and the amount in controversy does not exceed Ten Thousand ($10,000.00) Dollars, as hereinafter more fully appears." (T.R. 2).

Paragraph I of the appellee's complaint is admitted in Paragraph I of the appellant's answer. (T.R. 7). For jurisdiction of this court to review the decision of the District Court, see 28 U.S.C. 1291.

STATEMENT OF THE CASE

On June 26, 1945, the United States Treasury Department, Procurement Division, entered into a written contract with the Foster Transfer Company, a Washington corporation, appellee herein, wherein the appellee agreed to perform drayage, and packing and crating services for the appellant in accordance with the terms of the contract. Plaintiff's Exhibit 1 is a copy of the contract and a copy of the same will also be found beginning on page 24 of Exhibit A-6. Section 21 of the Special Conditions of said contract provides:

> "The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause."

Paragraph 3 of the General Provisions of the contract provides:

> "3. *Disputes*—Except as otherwise specifi-

> cally provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

The contract further provided on the first page thereof, that the appellee will furnish—

> "Drayage, packing and crating of supplies, equipment, furniture and household goods in Seattle, Washington, as may be required by the Procurement Division, U. S. Treasury Department, Seattle, Washington, and such other Government activities in the City of Seattle, as may desire to procure under this contract during the fiscal year beginning July 1, 1945 and ending June 30, 1946."

The appellee began performing under the contract on July 1, 1945. During the remaining months in the year 1945, the Treasury Department received complaints to the effect that the appellee was not performing satisfactory services required under the contract. On August 28, 1945, a conference was held between representatives of the Treasury Department and the appellee corporation, during which the appellee's unsatisfactory performance of the contract was discussed. On the same day a letter was transmitted from the Treasury Department to the appellee cor-

poration confirming this conference. (Ex. A-4, Ex. A-6, page 36 and Appendix I). On September 26, 1945, another such conference was held which was likewise confirmed by letter of same date (Ex. A-5, Ex. A-6, page 38, Appendix II).

Thereafter, the appellee continued to perform unsatisfactory services under the contract. From time to time the appellee's attention was directed to these matters orally by representatives of the appellant. On February 20, 1946, the appellee was notified by letter that the Government was exercising its rights of concellation effective as of the close of business February 28, 1946. (Ex. 2, Ex. A-6, page 13, Appendix III). In accordance with the letter of cancellation, the appellee performed no further services under the contract after February 28, 1946.

By letter dated February 25, 1946, the law firm of Maxwell and Seering, representing the appellee, made inquiry as to the reasons for the cancellation of the contract and the procedure to appeal under provision 3 of the General Provisions. (See page 14 of Ex. 6-A). By letter dated February 28, 1946, (Ex. A-3, page 15 of Ex. A-6, Appendix IV) the appellant advised the law firm of Maxwell and Seering of the reasons for the cancellation of the contract. On March 8, 1946, the appellee filed an appeal with the

Secretary of the Treasury under General Provision 3 of the contract. (Ex. A-6, page 6 and following). By letter dated July 11, 1946, the Secretary of the Treasury considered the appellee's appeal and sustained the action of the Contracting Officer in cancelling the contract. (Exhibit A-6, page 1, and Appendix V).

The appellee brought this action alleging it had fully and faithfully performed all things required under the provisions of the contract and that the U. S. Treasury Department had wrongfully, arbitrarily and without cause, canceled said contract, and that as a result thereof, appellee had been deprived of its profits for the unexpired portion of the term of the contract in the sum of Five Thousand ($5,000.00) Dollars. (T.R. 2, 3 and 4). The complaint does not in any wise mention or infer any special damage other than loss of profits.

The appellant in its answer admitted the existence of the contract and that the court had jurisdiction but denied all other allegations of the complaint. By affirmative defense the appellant alleged (1) that the appellee had filed an appeal under the provisions of the contract and the cancellation of the contract had been sustained by the Secretary of the Treasury; (2) that the said contract was canceled for good and sufficient cause, and (3) that the appellee

had not fully and faithfully conformed and complied with the provisions of said contract. The sole issues of fact as framed by the pleadings were (1) whether or not the appellant had good and sufficient cause to cancel the contract and (2) if not, how much profits the appellee had lost.

During the course of the trial while Mr. L. H. Doolittle, President of the appellee corporation, was testifying, the trial Judge interrupted the examination of the witness to inquire as to whether or not the appellee corporation had committed itself to any expenses which could not be terminated within the time allowed between the receipt of the notice of cancellation and the effective date of cancellation. This interrogation is set out on pages 62, 63, 64 and 65 of the Transcript of Record. In response to the interrogation by the trial Judge, the witness listed some $1,675.00 in such expenses. This was the only testimony adduced at the trial in regard to such expenses. All of such testimony was elicited from the witness by the trial Judge and none of the same was elicited by counsel on either side. The subject of special damages such as fixed expenses was not raised anywhere in the pleadings, the appellee having brought the action to recover loss of profits only.

The trial Court in its oral decision (T.R. 295

and 296) and in the written findings of fact (T.R. 12, 13, and 14) found that the appellee had not faithfully performed the services under the contract and that the appellant had just cause for canceling the contract.

The court then found that the notice given was not reasonable in that it did not give the appellee sufficient time to terminate his fixed expenses and awarded judgment in favor of the appellee in the sum of $1500.00 to cover such fixed expenses.

QUESTIONS RAISED

1. Can the court under the guise of interpretation, insert in a written contract a provision that the party exercising an express, unequivocal right of cancellation at any time must give the other party sufficient time to terminate his fixed expenses before the effective date of such cancellation?

2. When the evidence adduced by the parties is confined strictly to the issues framed by the pleadings, can the trial judge interrogate witnesses on other issues and decide the case solely on such other evidence?

3. When the plaintiff's complaint seeks recovery only for loss of profits and presents evidence only on such issues as are set out in the pleadings, can the

trial judge interrogate witnesses with regard to special damages and allow recovery on such special damage?

4. When by the terms of a contract it is provided that disputes concerning questions of fact shall be decided by the appellant's contracting officer subject to appeal to the Secretary of Treasury whose decision shall be conclusive, and the contracting officer determined that the services performed by the appellee are not satisfactory, and upon appeal taken by the appellee from such decision, the Secretary of the Treasury sustained the decision of the contracting officer, can the court impeach such a decision when no fraud, gross mistake or bad faith is present?

SPECIFICATIONS OF ERROR

1. The Court erred in finding that the contract required the appellant to give the appellee a sufficient time between the date of notification of cancellation of the contract and the effective date of such cancellation to terminate all fixed expenses.

2. The Court erred in questioning the witness L. H. Doolittle upon an issue of special damages not raised by the pleadings nor relied upon by either party.

3. The Court erred in allowing the appellee to

recover damages against the appellant for the special damages set out in Finding No. VI when the right to recover such special damages was not raised in the pleadings nor by any evidence, other than that elicited from the witness, L. H. Doolittle, by the Court.

4. The Court erred in impeaching the decision of the Secretary of the Treasury when the terms of the contract provided that such decision would be final and conclusive as to the parties.

ARGUMENT

1. Argument on Specification of Error No. 1

SUMMARY

In Specification of Error No. 1 it is the appellant's contention that the provisions in the contract stating "21. The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause." clearly and unequivocally expresses the intention of the parties and needs no interpretation. The trial Court's finding that the appellant was bound to give the appellee a reasonable time to terminate his fixed expenses before the effective date of cancellation is in fact inserting terms in the contract which the parties never intended. Such an interpretation utterly destroys the clear, unequivocal language of the contract, "at any time",

and places in the contract a provision to the effect that the appellant indemnifies the appellee against any and all loss which he may suffer by virtue of the appellant exercising the unequivocal right to cancel. The terms of the contract will permit no such interpretation.

ARGUMENT

The contract provides in Special Condition No. 21 "The Government reserves the right to cancel at any time for what may be deemed good and sufficient cause." The Court determined in the oral decision (T.R. 295) and in the findings of fact (T.R. 12) that the appellee had not faithfully performed the services required under the contract and the appellant had good and sufficient cause to cancel the contract under the terms of the above quoted condition No. 21. This finding of fact conclusively decides all issues of the case. The appellant having exercised the lawful right to cancel, the appellee is not therefore entitled to recover any damages.

However, the Court further decided the notice of cancellation given on February 20, 1946 (Appendix III) and received by the appellee on February 21, 1946, fixing the effective time of cancellation as of the close of business on February 28, 1946, was unreasonable. Such an interpretation is in fact re-

writing the contract for the parties. This ruling removes the words "at any time" and inserts in place thereof the words "upon giving reasonable notice." If the parties had wanted these words in the contract, they would have used them.

There are few principles of law more clearly settled in all jurisdictions than the doctrine that a court cannot rewrite a contract which the parties have made for themselves.

The contract was made in the State of Washinton and was to be performed in the State of Washington, therefore, both the law of that state as well as the Federal law will be quoted herein. The decisions of the Supreme Court of the State of Washington have steadfastly held to the well-settled principle of law which is quoted in the case of *Minder v. Rowley*, (decided November 7, 1949), 135 Wn. Dec. 86. In that decision on pages 88 and 89 it is stated:

> "The evidence produced at the trial of this case does not throw light upon the meaning to be given the word "proceeds"; therefore, we must give to it, as did the trial court, its usual meaning.
>
> This conclusion, it is true, leaves appellants in an unenviable position, but the courts cannot aid them. Appellant, Harry M. Case, entered into the contract, and it was not tainted by fraud or misunderstanding, hence he must abide its consequences.

The rule which must be applied was stated by Judge Dunbar as follows in *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 899:

'We are convinced that as long as people are privileged under the law to make contracts for themselves, if they are unwise enough to make contracts which are burdensome, the law cannot relieve them . . .

'They solemnly executed this contract, and in the absence of fraud it is conclusively presumed to speak the minds of the contracting parties. Any other construction would destroy the force and effect of all written obligations and leave everything to the chance of slippery memory, the very thing which a written contract is intended to guard against'."

In *Merlin v. Rodine*, 132 Wn. Dec. 734 (decided March 15, 1949), the Court further emphasized this principle in the following language:

"That the parol evidence admitted by the trial court did vary the terms of the written contract seems patent; and that it did not come within any of the recognized exceptions to the parol evidence rule is equally clear. We have consistently held that we cannot, upon general considerations of abstract justice, make a contract for the parties that they did not make for themselves. *Chaffee v. Chaffee*, 19 Wn. (2d) 607, 145 P. (2d) 244, and cases therein cited.

The respondents seek to justify the admission of the parol evidence on the basis of certain rules of construction. There is, however, no ambiguity or uncertainty in the contract as written, and consequently there is no basis for a resort to any of the rules of construction relied upon."

In the case at hand there was not one word of evidence either oral or written which would support the Court's finding that the parties ever intended that the appellant was ever required to give the appellee a reasonable time after notice of cancellation to terminate his fixed expenses.

In *Chaffee v. Chaffee*, 19 Wn. (2d) 607, the Supreme Court of the State of Washington stated, beginning on page 625:

> "It is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves. The expressions of the various courts on the subject are tersely stated in 12 Am. Jur. 749, Contracts, Sec. 228, as follows:
>
> 'Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties — that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties. If the parties to a contract adopt a provision which contravenes no principle of public policy and contains no ele-

ment of ambiguity, the courts have no right, by a process of interpretation, to relieve one of them from disadvantageous terms which he has actually made.'

See, also, 17 C.J.S. 702, Contracts, Sec. 296.

This court has frequently made similar statements of the law. In *Collins v. Northwest Cas. Co.*, 180 Wash. 347, 39P. (2d) 986, 97 A.L.R. 1235 we said:

'We are not permitted, upon general considerations of abstract justice, or in the application of the rule of liberal construction, to make a contract for the parties that they did not make themselves, or to impose upon one party to a contract an obligation not assumed.'

To the same effect, see *Hays v. Bashor*, 108 Wash. 491, 185 Pac. 814: *Johnson v. McGilchrist*, 174 Wash. 178, 24 P. (2d) 607; *Thomle v. Soundview Pulp Co.*, 181 Wash. 1, 42 P. (2d) 19; *Peabody v. Star Sand Co.*, 186 Wash. 91, 56 P. (2d) 1018."

In the case of *United States v. Moorman*, decided by the United States Supreme Court on January 9, 1950, case No. 97 (not yet printed in bound volumes), the principles announced by the Supreme Court of the State of Washington as above quoted are followed. This case will be more fully discussed under Specification of Error No. 4.

The decisions of the United States Supreme Court and the Courts of Appeals are in accord with the

decisions of the Supreme Court of the State of Washington.

In *Douglass v. Douglass*, 22 L.Ed. 479, 21 Wall. 98, the Supreme Court of the United States stated:

> "We cannot interpolate what the contract does not contain. Our duty is to execute it as we find it, and not to make a new one."

In *Sheets v. Selden*, 19 L.Ed. 166, 7 Wall. 416, the Court stated:

> "This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them."

In *Shell Oil Co. v. Manley Oil Corporation*, 124 F. (2d) 714, the Court stated on page 715:

> "Courts are not authorized to make contracts for the parties, but must construe them as written, and where plain, common words are used in their ordinary meaning, they must be accepted in that sense."
>
> (Cert. denied 316 U.S. 690, 86 L.Ed. 1761)

In *City of Philadelphia v. Lieberman*, 112 F. (2d) 424 the Court stated on page 429:

> "We cannot rewrite the agreement of the parties but must take it as they have written it." (Cert. denied 311 U.S. 679, 85 L.Ed. 438)

Numerous other cases within the Federal Jurisdiction may be found under Contracts in the Federal Digest under Section 143(b).

It should be here pointed out that the basic finding made by the Court in both the oral decision and the written findings of fact is that the Government had just cause for cancelling the contract. The finding that the contractor is entitled to recovery is inconsistent with that basic finding and cannot stand.

The fallacy of the trial Court's reasoning, that the appellant in its notice of cancellation must allow the appellee time to terminate its fixed expenses, becomes increasingly clear when the evidence upon which the amount of damages was determined is considered. (T.R. 62, 63, 64, and 65). Upon the Court's interrogation, the witness, Doolittle, testified that his fixed expenses were (1) rental on four trucks at $250.00 apiece for one month, total $1,000, (2) rental on a warehouse for 3 months at $75.00 per month, total $225.00, and (3) wages for two girls for one month, total $450.00.

Under the Court's reasoning, if the appellant had defaulted in the performance of his contract during the first month of the one-year term of the contract, and the appellant had rented the warehouse and trucks by the year and had likewise hired his help by the year, then the appellee would be bound to pay all of these expenses for 11 months. Thus the appellant is required to indemnify the appellee against

any and all loss by virtue of the contract. Such was never the intention of the parties as expressed by the plain, unequivocal terms of the contract. Such burdens cannot be imposed upon a party to the contract under the guise of interpretation.

Attention is called to the fact that one of the obvious purposes of a cancellation clause such as existed in this contract is to keep a constant pressure on the contractor to be punctilious in the performance of his obligations. It would be inequitable to the Government, which has inserted this clause for this very purpose, to deprive it of the benefits and protection of the clause by wholly relieving the contractor from any of the financial loss which might fall upon him solely because of his own failures in performance. It may be also added that there is no inequity toward the contractor where he has deliberately entered into commitments which would be embarrassing to him if, and only if, he fails to live up to his obligations.

The ruling of the trial judge cannot be sustained under the pretense of justice under the doctrines of equity. The president of the appellee corporation testified that his company made $13,421.00 profit out of the contract during the 8 months it was in force (T.R. 38). Certainly, a loss of $1,500.00 due entirely

to the appellee's failure to faithfully perform the services required under the contract, after repeated warnings, is not shocking to anyone's conscience. To hold the appellant liable for any and all loss which the appellee might suffer in spite of such profits, is without justification. The ruling of the trial Judge must be reversed and judgment entered for the appellant.

2. Argument on Specifications of Error 2 and 3.

SUMMARY

The Court erred in interrogating the witness Doolittle on issues of fact not pleaded nor relied upon by either party. In so doing the Court injected into the case issues neither party was prepared to meet. Trial judges are not permitted to create and decide issues which neither party has contemplated. In so doing the trial judgment in effect violated the parol evidence rule which is a rule of substantive law in the State of Washington rather than a rule of procedure.

ARGUMENT

Since specifications of error 2 and 3 are directed to the errors of the trial court in interrogating a witness on issues not raised by the pleadings, those two specifications will be argued together.

The appellee's complaint alleges that the appellee was deprived of $5,000.00 in loss of profits and the prayer of the complaint asks for that amount only. There is no mention in the allegations of the complaint of any special damages such as expenses incurred for the purpose of fulfilling the contract nor does the prayer thereof ask for any other or further relief.

Nowhere in the pleadings, argument or evidence adduced by the parties through their counsel is there any mention of special damages as above mentioned. The only mention of such expenses is found in the answers to questions propounded at the trial by the trial judge to the witness Doolittle. (T.R. 63, 64, 65). Upon this evidence and this evidence alone, the trial judge allowed a recovery to the appellee. It is the appellant's contention that the interrogation of the witness Doolittle by the trial judge on the subject of special damages was clearly erroneous. It is further the appellant's contention that the court erred in allowing a recovery on the special damages not mentioned in the pleadings nor relied upon by the appellant.

Rule 9g of the Federal Rules of Civil Procedure provides:

> "When items of special damages are claimed, they shall be specifically stated."

This rule is a restatement of the law as it existed before the rule was promulgated. The following quotations from 25 Corpus Juris Secundum explain the reasons for the rule. Section 130, 25, C.J.S. at page 745:

> "Plaintiff's initial pleading in an action for damages must state facts sufficient to constitute a cause of action, show that plaintiff has been damaged by reason of the wrongful acts complained of, and how he was damaged; and it must ordinarily set out the amount of damages sustained in definite amount, or afford a basis upon which damages may be estimated, and otherwise show right of recovery. The necessary elements must be alleged so that defendant may be prepared to meet them, and defendant is entitled to know from the declaration the character of the injury for which he must answer. * * *."

Section 131, 25 C.J.S. at page 753:

> "Only the damages which are the necessary result of the acts complained of can be recovered under a plea of general damages. Hence, it is generally held that special damages, which are the natural but not necessary result of the wrongful acts or injury, must be particularly averred in the complaint to warrant proof of or recovery therefor, except where such damages are conclusively presumed from the facts stated. This is true whether they result from tort or breach of contract, and the rule applies in equity as well as at law. It follows that any attempt to introduce evidence of such damages under a general averment of damages is a fatal variance between the pleadings and proof, and is therefore not permissible, although proof of special injuries

not alleged is often competent for the purpose of showing the extent of the injuries, and not as an item of damages.
* * *."

Section 143, 25 C.J.S. at page 781:

"In actions for damages, it is essential that plaintiff prove all facts permitted by the pleadings and necessary to establishment of the damages he seeks, and such proof as is warranted by the pleadings may be made.

Only such matters and issues involving damages can be considered as are raised by the pleadings.

The pleadings and proof must correspond, although substantial correspondence between the pleading and proof as to damages is sufficient, and the damages recovered must be warranted by the pleadings, and the proof.

Since a defendant is entitled to know from the plaintiff's pleading the character of the injury for which he must answer, see supra Sec. 130, proof must be confined to the injuries alleged or to injuries resulting from those alleged. * * *."

One of the classic cases on this subject is the case of *Pacific Coin Lock Co. v. Coin Controlling Lock Co.*, 31 F. (2d) 38, (9 C.C.A.). In that case as in this one, the trial judge rendered his entire decision upon issues not covered by the pleadings nor relied upon by the parties and allowed damages which were not alleged in the complaint. The decision states on page 39:

"We are of the opinion that the judgment must be reversed for the reason that it was given for

a cause not within the issues. It is elementary that to be recovered damages must be pleaded. * * *.

In the second amended complaint appellee specifies six different particulars in which appellant is alleged to have breached the contract, but nowhere is it even intimated that it failed to pay rentals or that there was any sum due on that account, nor were any facts alleged from which it could be inferred that any such contention would be made at the trial. To the contrary, the pleading by implication clearly negatives such a claim. Immediately following the averments of the several alleged breaches are allegations of three distinct sources or items of damages, namely: (1) Damages in the amount of $100,000 on account of the alleged failure of appellant to assign to appellee contracts made by the former with numerous users of the locks, which, under the contract in suit, were to be turned over to appellee; (2) $4,575 as being the value of 183 locks at $25 each, which appellant declined, so it is alleged, to surrender; and (3) $25,000 on account of the value of coins alleged to have been in the lock receptacles at the time the contract was breached, and which, under the terms thereof, were to be the property of appellee. And the prayer is specifically for these three several items and nothing else. True, there is a prayer for 'other and further relief', but with or without this general prayer the court could grant only such relief as under some view of the law could be predicated upon the alleged facts. Here, as already noted, not only was there a complete failure to allege facts disclosing a default in the payment of any rent, but appellee expressly specified the particular damages it claims to have suffered, and under the general rule that, having specified the source and kind of damages he seeks

> to recover, a plaintiff cannot at the trial change his position, it is bound by these specifications. In any other view a complaint would not only be useless as a means of advising the defendant of the issues he must meet, but would be misleading and would constitute a trap. 17 C.J. 1021, 1022; *Rathbone et al v. Wheelihan*, 82 Minn. 30, 84 N.W. 638; *Hanson v. Smith* (C. C.A.) 94 F. 960.
>
> It is to be added that we do not have a case where there is a general allegation of damages which defendant did not seek to have made more definite or there is an allegation of general damages, or where damages have been imperfectly pleaded, or where the appellant fails seasonably and appropriately to object to the evidence as not being relevant to the issues, or where both parties tried the cause upon the theory upon which is was decided. * * *."

It is true that the Coin Lock case was decided under the Conformity Act requiring the Federal Court to follow the State practice. However, Rule 9g of the Federal Rules of Civil Procedure is merely a restatement of the rule in the State of California as followed in the Coin Lock case.

In the case of *McBride v. Callahan*, 173 Wash. 609, the trial judge injected into the trial, the theory of impossibility of performance as a defense to the plaintiff's action upon a contract. On page 616 the Supreme Court of the State of Washington stated:

> "No issues were framed under which the respondent subcontractors could recover on the

> trial court's theory — impossibility of performance was not pleaded, and there was no allegation of modification of the written subcontract which respondent subcontractors admitted they made with McBride."

Then after discussing the authorities, the court stated on page 620:

> "The subcontractors admitted that they made the subcontract with McBride. They denied failure to perform that contract. The trial court found, and the respondents contend in this court, that the contract was impossible of performance. The respondents failed to plead impossibility of performance of the contract. Matters absolving the subcontractors from liability for non-performance of the contract was not incorporated in an amended or supplemental complaint; permission so to do was not requested. The defense of impossibility of performance is not, under the pleadings, properly before us."

Thus, under the Federal law as well as the State law the trial judge cannot decide cases on issues not raised by the pleadings nor relied upon by either party. The trial judge's decision to allow recovery to the appellee upon a theory not pleaded cannot stand.

It may be argued that no exception was taken to the questioning of the witness, Doolittle, by the trial judge. From the nature of the questions asked, it was difficult to determine what ultimate fact the trial judge was attempting to reach. There being no jury present, no objection was indicated. Further,

under the law of the State of Washington, objections need not be taken to evidence admitted in violation of the parol evidence rule. In the case of *Mead v. Anton*, 133 Wn. Dec. 713 at page 717, the Supreme Court of the State of Washington stated:

> "The admission of testimony in violation of the parol evidence rule, does not make the testimony admitted competent, whether it is admitted without, or over, objection. In the recent case of *Dennison v. Harden*, 29 Wn. (2d) 243, 186 P. (2d) 908, we said:
>
> 'The parol evidence rule is not a rule of evidence; it is a rule of substantive law, and testimony falling within the inhibitions of the rule does not become admissible merely because it is not objected to: (Citing cases.)'"

As stated in the above quotation, the parol evidence rule is a rule of substantive law and not a rule of procedure in the State of Washington. The contract in question having been made and entered into in the State of Washington, the substantive law of that state applies.

While it is true the answers to the questions propounded by the trial judge do not on their face seem to violate the parol evidence rule, it must be conceded that in the final result, the construction placed upon these answers by the trial judge did alter the terms of the contract. Therefore, it makes no difference whether there was an objection to the questions

propounded by the trial judge since the evidence admitted was in fact in violation of the parol evidence rule.

For further authority on the application of Rule 9g see the case of *American Surety Co. of New York v. Franciscus*, 127 F. (2d) 810, wherein the Court of Appeals for the Eighth Circuit stated at page 817:

> "Rule 9(g) of the Rules of Civil Procedure, 28 U.S.C.A. Following section 723c, provides that 'When items of special damage are claimed, they shall be specifically stated.' Section 6040 of the Revised Statutes of Missouri 1939, Mo. R.S.A. Sec. 6040, provides: 'In any action against any insurance company to recover the amount of any loss, under a policy of * * * indemnity, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict.' The Supreme Court of Missouri has declared that such damages and attorney's fees are 'exemplary or punitive in character', *Jones v. Prudential Ins. Co.*, 173 Mo. App. 1, 155 S.W. 1106, 1110, and that 'there must be appropriate allegations in the petition showing that plaintiff claims and is entitled to these damages, and such allegations must be sustained by the proof.' *Fay v. Insurance Company*, 268 Mo. 373, 187 S.W. 861, 865.
>
> The petition in the instant case does not allege vexatious delay. There are no allegations show-

ing that plaintiffs are entitled to damages for such delay and for an attorney's fee. Accordingly there is no support in the pleadings for the allowance.

The judgment must be modified by striking therefrom the provision allowing attorney's fees for plaintiffs' attorneys in the sum of $1,500, and, as so modified, is affirmed."

In the case of *Burlington Transp. Co. v. Josephson,* 153 F. (2d) 372, at page 377, the court stated:

"Rule 9(g) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Following section 723c, provides that 'When items of special damage are claimed, they shall be specifically stated.'

In the case of *Simmons v. Leighton,* 60 S.D. 524, 244 N.W. 883, 884, the Supreme Court of South Dakota said: 'The distinction between general and special damages and the necessity of a special allegation to permit proof and recovery of damages is well settled. Special, as distinguished from general, damages are those which are the natural but not the necessary consequence of the act complained of. 17 C.J. 715. The plaintiff under a general allegation of damages may recover all such damages as are the natural and necessary result of such injuries as are alleged for the law implies their sequence. 2 Sutherland on Damages (4th Ed.) Sec. 418. Not every loss which may result from an injury is a natural and necessary result of the injury. To permit recovery of other or special damages there must be allegation of the specific facts showing such damages to apprise the defendant of the nature of the claim against him.'

This distinction between general and special damages prevails generally. 25 C.J.S., Damages,

Sec. 2; 15 Am. Jur., Damages, Sec. 10. General compensatory damages only were claimed in this case. In other words, only such damages were alleged in the complaint as are the natural consequence of the false arrest and false imprisonment, such as humiliation, embarrassment and the costs incident to obtaining a release from detention. In the federal courts an indispensable allegation in a demand for special damages is a statement 'of the special circumstances giving rise to the special damages.' *Huyler's v. Ritz-Carlton Restaurant & Hotel Co.*, D.C., 6 F. (2d) 404, 406, 407."

3. Argument on Specification of Error No. 4.

SUMMARY

The contract in this case provided for the settlement of disputes by the Contracting Officer, subject to written appeal by the the contractor within 30 days to the Secretary of the Treasury whose decision shall be final and conclusive upon the parties thereto. The appellee here being the contractor, did appeal to the Secretary of the Treasury. The Secretary of the Treasury acted upon the appeal and sustained the decision of the Contracting Officer. Therefore, the parties having agreed as to the manner of settling disputes, the appellee is not entitled to challenge the final decision of the Secretary of the Treasury.

ARGUMENT

General Provision 3 of the contract provided:

> "3. *Disputes*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

The appellee after receiving notice of the Contracting Officer's determination to cancel the contract under Special Condition 21, filed an appeal with the Secretary of the Treasury in accordance with General Provision No. 3. The disputed fact was whether or not the appellee had faithfully performed the services required under the terms and conditions of the contract. (Ex. 6-A). In acting upon the appeal, the Secretary of the Treasury expressed an opinion that General Provision 3 did not apply. However, despite such opinion, the Secretary of the Treasury went on and acted upon the merits of the appeal as though such provision was applicable and sustained the decision of the Contracting Officer. (Appendix V).

The decision of the United States Supreme Court in *United States v. Moorman*, Case No. 97, October Term, 1949, decided January 9, 1950 (not yet published in bound volume), seems to disagree with the

Secretary of the Treasury in his opinion that General Provision 3 is not applicable. This provision is in the contract and both parties are bound by its terms whether the Secretary of the Treasury believes such provision applicable or not.

In the case just cited, Moorman contracted to grade the site of a proposed aircraft plant. The compensation was fixed at 24c per cubic yard of grading satisfactorily completed. A proposed taxiway was shown in the drawings but not covered by the specifications. Thereafter, a dispute arose as to whether the grading of the proposed taxiway was covered by the contract. Upon demand by the Government, Moorman performed the grading work but filed a claim for compensation at the rate of 84c per cubic yard. The Government denied the claim and Moorman appealed under the provisions in his contract which are identical with General Provision 3 of the contract in the case at hand. The Secretary of War upon considering the facts, sustained the action of the Contracting Officer in denying the claim. The Court of Claims overturned the administrative decision. In reversing the Court of Claims, the Supreme Court stated:

> "In upholding the conclusions of the engineer the Court emphasized the duty of trial courts to recognize the right of parties to make and rely

on such mutual agreements. Findings of such a contractually designated agent, even where employed by one of the parties, were held 'conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith.'

The holdings of the foregoing cases have never been departed from by this Court. They stand for the principle that parties competent to make contracts are also competent to make such agreements."

Then the Court goes on to say:

"It is true that the intention of parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language. *Mercantile Trust Co. v. Hensey*, 205 U.S. 298, 309. But this does not mean that hostility to such provisions can justify blindness to a plain intent of parties to adopt this method for settlement of their disputes. Nor should such an agreement of parties be frustrated by judicial 'interpretation' of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government.

Second. We turn to the contract to determine whether the parties did show an intent to authorize final determinations by the Secretary of War or his representatives in this type of controversy. If the determination here is considered one of fact, Sec. 15 of the contract clearly makes it binding. But while there is much to be said for the argument that the 'interpretations' here presents a question of fact, we need not consider that argument."

and finally states:

> "No ambiguities can be injected into it by supportable reasoning. It states in language as plain as draftsmen could use that findings of the Secretary of War in disputes of the type here involved shall be 'final and binding.' In reconsidering the questions decided by the designated agent of the parties, the Court of Claims was in error. Its judgment cannot stand."

The Moorman case and the case at hand cannot be distinguished. In both cases the contractor having exhausted his full rights under the contract is not entitled to have the courts second-guess the administrative decision. It will be noted that the above quotations from the Moorman case are squarely in accord with the appellant's theory in Specification of Error No. 1, that the trial court cannot rewrite a contract for the parties.

CONCLUSION

The trial Judge having determined that appellant had good and sufficient cause to cancel the contract, all issues of the lawsuit were then and there determined. The trial Judge having erred in rewriting the contract, the judgment must be reversed and judgment entered for the appellant.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

APPENDIX

I.

TREASURY DEPARTMENT
PROCUREMENT DIVISION
Region 11
2028 Eighth Avenue
Seattle 1, Washington

PS
CONTRACTS
Tllrp-156 August 28, 1945

Foster Transfer Company, Inc.
1310 East Pine Street
Seattle 22, Washington

Attention: Mr. H. L. Doolittle

Gentlemen:

Reference is made to our conference this morning relative to service under Contract No. Tllrp-156. As a matter of record, I should like to restate the substance of our discussion and the suggestions and recommendations which were made for improvement in the service under the subject contract.

In order to eliminate the possibility of undertaking hauling jobs with insufficient accessorial equipment, a procedure should be developed so that on services ordered over the telephone all necessary information can be obtained at one time and plans made for prompt and efficient accomplishment of the work requested by the ordering agency.

In order to eliminate delays and unsatisfactory service, additional equipment should be made available, particularly in the smaller capacity units, such as ½-ton, ¾-ton and 1-ton trucks. When ordering agencies describe the job to be performed, a truck of the minimum size required should be utilized, and in those instances where you are unable to furnish

a minimum size truck and by your own choice furnish a heavier vehicle, every precaution should be taken to insure billing at the minimum vehicle rate.

Your employees should be strictly trained and disciplined in the importance of rendering service in absolute compliance with the ordering agencies' wishes. You are a service agency and, as such, should observe the customers' wishes with respect to the manner in which jobs are performed when a customer expresses his preference. In those instances where the ordering agency indicates no preference in handling, then, of course, you should do the job in the customary and most efficient way. It cannot be emphasized too strongly that when an ordering agency specifies the manner in which a job is to be performed, it should be performed in that manner even though to do so may result in slightly greater cost than otherwise. This cost is frequently offset by advantages to the ordering agency in having the work performed in accordance with their specifications.

Along this line, it might pay dividends to discuss this at more or less regular intervals with your truck drivers so that "customer satisfaction" is always the objective in performing jobs under the contract.

It is sincerely hoped that the standard of performance under the contract will be improved as a result of our discussion, and such corrective measures as you believe necessary will be applied. If complaints continue and are found to be justified, we should otherwise be forced to seek relief in accordance with the terms of the contract. We hope this will not be necessary.

Very truly yours,

CHARLES E. STREET, Acting Chief
Purchase and Supply Division

GKClark:LP

II.

TREASURY DEPARTMENT
PROCUREMENT DIVISION
Region 11
2028 Eighth Avenue
Seattle 1, Washington

PS
CONTRACTS
Tllrp-156 September 26, 1945

Foster Transfer Company, Inc.
1310 East Pine Street
Seattle 22, Washington

Attention: Mr. H. L. Doolittle

Gentlemen:

Reference is made to our discussion this forenoon concerning your service contract No. Tllrp-156, with specific reference to Item No. 2(A).

I have reviewed the record and regret to tell you that I can see no way by which an amendment to the contract can be made, or any concessions legally granted to you. As I understand it, you are chiefly concerned about the small items of household goods aggregating less than 1,000 pounds. Your quoted price, 75c per hundred pounds, is identical to that extended by another bidder at the time award of the entire contract was made to your firm. There is no evidence, therefore, that any mechanical error occurred in the statement of price when the bid was submitted.

I understand, in a discussion you had with Mr. G. K. Clark, purchasing and contracting officer in this office, it was your contention that your representatives have been required, in some cases, to await the convenience of the Government employee whose household goods were to be moved, thus resulting in

a loss of time for which no compensation can be granted. I am informed, however, that you have been asked to supply this office with details of future similar instances so that the cause can be removed. We shall be very glad to cooperate fully with you in this direction.

The review of the record and discussion with Mr. Street brought to light certain criticisms of your services which have already been enumerated in his letter of August 28 to you. I only want to add a word of caution to you to comply fully with the intent and letter of the contract. The contract provisions contemplated clearly that you must be in a position to supply all equipment and manpower and other services promptly and in an efficient manner and, aside from the fact that any deficiencies on your part jeopardize your present contract and your surety, any unsatisfactory experience with this particular contract will be an important factor in the award of any future contracts. A service contract of this nature will be a permanent arrangement hereafter, so full compliance with its terms, I am sure you agree, will be an important concern to you in the long run.

Very truly yours,

WM. B. IHLANFELDT
Regional Director

WBIhlanfeldt:LP
cc: Ihlanfeldt

III.

TREASURY DEPARTMENT
PROCUREMENT DIVISION
Seattle 1, Washington

PS
CONTRACTS
Tllrp-156 February 20, 1946

REGISTERED MAIL

Foster Transfer Company
1310 East Pine Street
Seattle 22, Washington

Gentlemen:

Reference is made to Contract Tllrp-156, wherein Items 1, 2, 3 and 4 of Bid Invitation Tllrp-45-342 were awarded to you June 26, 1945, for the fiscal year 1946.

Please be advised that in conformity with numbered Paragraph 21 of "Special Conditions", the Government is exercising its rights of cancellation effective at the close of business February 28, 1946.

Accordingly, Contract Tllrp-156 shall have no force on and after March 1, 1946, and in the event you are requested by any Federal Agency to perform any of the services hitherto covered by Contract Tllrp-156, you are advised to notify the ordering agency that the tendered job can not be performed under the contract and, if ordered, must be by virtue of separate negotiations and agreement with the specific agency involved.

A copy of this notice of termination is being furnished all Federal Agencies so that there should be very few, if any requests for services under Contract Tllrp-156 subsequent to March 1, 1946.

Very truly yours,

WM. B. IHLANFELDT
Regional Director

IV.

TREASURY DEPARTMENT
PROCUREMENT DIVISION
1524 Fifth Avenue
Seattle 1, Washington

P
SUPERVISION
General

February 28, 1946

Messrs. Maxwell & Seering
Attorneys at Law
White-Henry-Stewart Building
Seattle 1, Washington

Gentlemen:

Your letter of February 25, 1946 is received. It is assumed that reference in your letter to a Treasury Department letter of February 12 is an oversight, inasmuch as the only recent letter to the Foster Transfer Company from this office carried the date of February 20, 1946 cancelling Contract Tllrp-156.

We are unable to provide you with any appellate procedure in regard to this termination, inasmuch as the contract specifically provides, (Paragraph 21, Page 9):—"The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause." This provision supercedes the General Provision to which you have made informal reference, viz., Article 3 which reads as follows:

> "3. Disputes. — *Except as otherwise specifically provided in this contract,* (underscoring supplied) all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclu-

sive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

Since Paragraph 21, page 9, specifically provides for cancellation, there can be no question of our authority for doing so.

In any event, however, we are entirely willing to supply a statement of the principal reasons for this action, as follows:

1. During the contract period of approximately seven months, numerous oral and some written notices and protests were filed with Mr. Doolittle concerning the inadequacy and generally poor condition of his automotive equipment. Complaints from Federal Agencies are on file in this office on this point. Our letters of September 26 and August 28, 1945 bear on this subject. No material improvement of the situation resulted from these protests.

2. In a number of instances, open flat-bed trucks were provided by the contractor despite the fact closed trucks (or vans) were specifically ordered for specific jobs in inclement weather, with the result that Government property was damaged. In one instance, a federal agency ordered a closed van to transfer special technical radio and laboratory apparatus. After a delay of two days, the contractor appeared on the scene with a flat-bed truck in inclement weather. In another case, Government furniture was rain damaged when moved on a flat-bed truck in wet weather without adequate quilting. In still another case, a flat-bed truck was sent (in the absence of an available van) to move the household goods of a Federal employee. This employee reported that the furniture got extremely wet before it reached the contractor's warehouse. These are examples only.

3. Despite numerous oral promises, Mr. Doolittle has either been unable or unwilling to provide

an adequate number of trucks to efficiently perform the job.

4. Frequently, Mr. Doolittle supplied trucks larger than necessary, or conversely, smaller than required, involving additional costs to the Government.

5. By actual, first-hand experience acquired by us during the recent transfer of Government property from our Wallingford Warehouse, to 1518 First Avenue South, Seattle, and on a basis of complaints by other Federal Agency users, Mr. Doolittle's supervision and management were inadquate to the point where his employees either refused to perform efficient work, or were without proper direction to enable them to do so. In one instance, one of his employees, evidently intoxicated, attacked a Government employee in the presence of Mr. Doolittle. Mr. Doolittle failed to intervene, although we understand he subsequently discharged the man.

Criticism of Mr. Doolittle and his lack of management was frequently expressed by his own employees to our representative, both on and off the job. This expressed lack of confidence in his leadership noticeably depreciated the efficiency of his people and thus prolonged the jobs for which the Government paid additional amounts of money. Moreover, this condition caused delays in effecting the transfer of Government property, often at great inconvenience and expense to using federal agencies.

I regret the necessity for cancelling this contract, but I had no alternative than to do so to protect the Government's best interests.

Very truly yours,

WM. B. IHLANFELDT
Regional Director

V.

July 11, 1946

Foster Transfer Company, Inc.
1310 East Pine Street
Seattle 1, Washington

Gentlemen:

Reference is made to your appeal from the action of Mr. William B. Ihlanfeldt, Region Director, Procurement Division, Treasury Department, Seattle, Washington, cancelling, effective February 28, 1946, Contract No. Tllrp-156 pursuant to Paragraph No. 21 of the General Conditions thereof reserving to the Government the right to cancel such contract at any time for what may be deemed good and sufficient cause and terminating your right to proceed further thereunder. You assign as a basis for such appeal Paragraph 3 (Disputes) of the General Provisions of Service Contracts attached to and made a part of such contract and Procurement Regulations No. 3 .

Inasmuch as Procurement Regulations No. 3 were issued by the War Department, they have no application to contracts awarded by this Department and, accordingly, will not be considered in the decision on such appeal.

It appears from the record that the foregoing contract for drayage, packing and crating of supplies, equipment, furniture, and household goods in Seattle, Washington, as may be required by the Procurement Division of this Department in Seattle, Washington, and such other Governmental activities in such city as might desire to utilize the services provided for thereunder during the fiscal period beginning July 1, 1945, and ending June 30, 1946, was awarded to your company under date of June 26, 1945, as the low bidder and upon assurances by responsible officials of your company that you owned or had under rental

adequate equipment to perform the services stipulated therein and further that you had adequate and trained personnel to operate such equipment and perform such services. The record establishes that you were notified in writing on two occasions and orally on numerous other occasions that your performance under such contract was unsatisfactory and that you were called upon to remedy the conditions brought to your attention which you neglected and failed to do. Such unsatisfactory services consisted of delays after the receipt of adequate advance notice in performing necessary drayage services seriously inconveniencing proper performance of necessary Government operations; inadequate equipment, either larger vehicles than necessary to perform the job described or smaller vehicles than necessary to perform such jobs, thus increasing the expense to the Government for performing the services, in the former by charges for such larger vericles at the contract rate and in the latter by excessive time resulting in excessive cost. In some instances you furnished open transportation where the order specifically stipulated closed transportation because of the type of equipment to be moved. The personnel supplied in many instances was inadequate either as to numbers or ability, thus unduly delaying the completion of the job at additional expense to the Government and requiring in some instances the assistance of Government personnel to properly supervise your employees so as to insure satisfactory handling of the transportation. All of the foregoing deficiencies, occurring in the performance of services for other than the Procurement Division, have been reported to such Procurement Division and in turn relayed to officials of your company. In addition and in connection with services performed for the Procurement Division, all of the foregoing deficiencies likewise appeared and were reported to officials of your company with the demand that necessary steps be taken to rectify them. During the course of the consolidation of two Pro-

curement Division warehouses in Seattle which you definitely assured officials of the Procurement Division would be completed as to a portion thereof within a period of seven days without any break in service to be performed for other governmental agencies eligible to obtain services under such contract, such performance was not completed until eleven days had expired at added expense to the Government due to inadequate equipment, inadequate personnel and improper management and supervision. In addition and during such period, you were unable to serve the demands of agencies other than the Procurement Division with the result that necessary Government operations were seriously delayed.

The determination to cancel your contract was based not on the fact that your services had been unsatisfactory with respect to all governmental agencies for whom such services were performed but as a result of complaints received from those governmental agencies which contended that your services had been inadequate in any or all of the foregoing respects. With reference to your statement that representatives of all agencies contacted by you for which services had been performed under the contract stated that no complaint existed as to the performance of such services presumably supporting such statement by Exhibit "D" to your appeal, there is no information to indicate that the parties signing such statement had any personal knowledge of the facts concerning which they have spoken or were authorized to express an opinion on behalf of the agencies which they represented as to the manner in which the services were performed. In at least two instances agencies represented in such statement have indicated that the employees signing such statement had no authority to do so; that such employees were without adequate knowledge of the facts to make such statements on behalf of such agencies; and that the services were in fact unsatisfactory.

Taking into consideration the facts as they appear in the records of this Department, I am of the opinion that the action of Mr. Ihlanfeldt, the contracting officer on your contract, in cancelling your contract under the provisions of Paragraph 21 thereof was amply justified and, accordingly, sustain such action and deny your appeal.

Very truly yours,

(Signed) E. H. Foley, Jr.
Acting Secretary of the Treasury

cc: Maxwell & Seering
Attorneys at Law
804 White Building
Seattle, Washington